

## Public participation and appeal rights in decision-making on wind energy infrastructure: a comparative analysis of the Danish and English legal framework

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# **Public Participation and Appeal Rights in Decision-making on Wind Energy Infrastructure: A Comparative Analysis of the Danish and English Legal Framework**

## **Abstract:**

This article is concerned with public participation and its linkages with appeal rights in planning decisions for major onshore wind farms in England and Denmark. We are particularly interested in how the legal framework shapes the scope of participation and appeals and, more specifically, whether a third party right to appeal (TPRA) has a participatory potential beyond the initial decision-making process. Despite structural differences, our analysis shows that in both countries the legal frameworks limit the participatory potential of administrative appeals, either through a restricted third party access to appeal mechanisms or through a restricted scope of review in appeals. Even where access is unrestricted, TPRA can hardly constitute an extension of participation, unless the scope for review is equally extended. Thus, reliance on TPRA as a participatory tool would require changes of the legal framework in both jurisdictions.

**Keywords:** Public Participation; Wind Energy; Planning; Third Parties Right to Appeal; Access to Justice.

## **1. Introduction**

Public participation is an important condition for ensuring both the procedural legitimacy (i.e. legitimacy of the decision-making process) and substantive quality of environmental decision-making. International, regional and national environmental law institutionalise the right of individuals and groups to participate in decisions that might have an impact on their environment. In most jurisdictions, this occurs primarily through public consultation within environmental impact assessment (EIA) and planning processes. Under European Union (EU) law and international regional agreements, such as the Aarhus Convention (UNECE 1998), participation requirements apply to decisions on plans, programmes and – as appropriate – policies, as well as to the authorisation process for individual projects, such as wind energy generating infrastructure (Directive 2011/92/EU).

Public participation in decisions on wind energy is an area of increasing academic interest, often due to tensions in balancing climate change mitigation objectives and public concerns about the local impact of these infrastructures (Ellis and Ferraro 2016; Lee et al. 2013;

Rydin et al. 2015; Armeni 2016; Ottinger et al. 2014; Aitken et al. 2016). Multidisciplinary research has explored wider questions of how evidence is constructed and weighted in environmental decision-making between different actors involved and how people perceive their role in the decision-making process (Rydin et al 2018; Lee 2017). The development of wind energy in the EU Member States is a central aspect of the wider EU energy and climate policies. While it is important for meeting EU binding targets for renewable energy and national objectives, wind energy is also an example of how clashes between national and local interests are dealt with in the Member States. Although the general argument that the lay public irrationally and emotionally rejects energy projects close to their locality (“Not In My Backyard” argument) has been widely dismissed (Aitken 2010; Burningham et al 2015; Devine-Wright 2005, 2009; Wolsink 2006; van der Horst 2007), the complexity and nuances of the factors shaping local acceptance of these projects remain challenging for regulators (Ellis and Ferraro 2016). An important conclusion from this literature is that citizens feel that their arguments are often given little weight in the decision-making, and that the scope of participation is too narrow (Ellis et al 2009; Aitken et al 2008; Ottinger et al 2014; Rydin et al 2015; Larsson and Emmelin 2016; Clausen and Rudolph, 2019).

From a legal point of view, a distinction is drawn between participation in decision-making and appeals to appeal bodies or the courts as reflected in the Aarhus Convention. The Convention explicitly links participatory rights in decision-making to the so-called access to justice rights, i.e. the right to have access to courts or another independent appeal body. As a result, participation and access to justice sit in a continuum of procedural environmental rights granted to individuals and groups by the Convention. Such access to justice rights are in legal terms a tool to enforce the rights of participation and access to information in environmental decision-making as stipulated in the Convention.

In this article we are concerned with how the legal framework draws linkages between public participation and appeals in the environmental decision-making processes. More specifically, we are interested in whether a right for members of the public – as third parties – to launch appeals against decisions by the authorities to an administrative appeal body (e.g. a planning tribunal or another appeal body) has the potential to expand participation beyond the initial decision-making. Within this context, Third Parties Rights to Appeal (TPRA) is a particular form of access to justice that is little explored in the environmental law and planning literature and that – we argue – sits in a conceptual limbo between extended participation and access to justice.

The analysis is underpinned by an account of the underlying policy justifications (i.e. “rationales”) of participation and appeals (section 2) and of how their linkages are drawn in the legal framework with a particular focus on the Aarhus Convention (section 3). We then look closer into how the legal framework shapes the space for public participation and appeals in planning and environmental impact assessment (EIA) decisions regarding major onshore wind farms in England and Denmark (section 4). The analysis and comparison of the space for public participation and appeals in these two jurisdictions is interesting because of the differences and similarities between these countries’ policy and regulatory approaches to wind energy infrastructure. Broadly speaking, the development of wind energy stories in England and Denmark has taken different routes. Wind energy infrastructure development in Denmark has followed – at least initially- a bottom-up approach through local initiatives and community ownership (Gipe 1995). Conversely, in England the implementation of wind energy projects has been driven by a top-down approach catalysed by national policy (DECC 2011a, DECC 2011b) and private sector initiative, particularly for offshore developments (Kern et al. 2014). However, the regulatory decision-making structure combining planning and EIA procedures at local level is somewhat similar in the two countries, at least at the time of writing. Yet, important differences remain in particular as regards third party access to administrative appeal.

Our analysis shows that the legal framework shapes the space for participation and appeals in different ways, in particular as regards the substance of decisions. Overarching policy objectives (either at national or local level) and an expert-based administrative setting for participation in decision-making associated with in particular environmental impact assessments may limit the scope for lay concerns to influence decision-making. Furthermore, the administrative appeal systems are restricted in either third party access to appeal (England) or scope of review (Denmark) (section 5). In both jurisdictions, the right to appeal is ultimately conceived as a narrow enforcement mechanism, rather than an extended space for substantive participation. Thus, reliance on TPRA as a participatory tool would require more profound changes of the legal framework in both jurisdictions.

## **2. Public Participation and Right to Appeal in Environmental Decision-Making: Rationales and Linkages**

The meaning of public participation in environmental decision-making is ambiguous. The legal and regulatory approach to participation has followed different, and often overlapping, rationales, based on procedural, substantive and instrumental justifications, making it a concept that means different things to different people (Barton 2002; Stirling 2006).

As regards the procedural rationale, participation is generally considered a procedural requirement for the democratic legitimacy of decision-making processes and their outcomes (Stirling 2005, Ebbesson 1998). According to the Aarhus Convention, people have the right to be informed and participate in shaping decisions that will affect their environment and local area. Of course, there are significant graduations in the citizens' ability to affect the outcome of the decision-making through public participation (Arnstein 1969; Richardson and Razzaque 2006). The proceduralisation of the right to participate is a common regulatory approach to allow democratic involvement in environmental decision-making, but it often fails to consider the substantive quality of the process (Lee and Abbot 2003; Steele 2010).

As regards the substantive rationale, public participation is a condition for reaching better decisions, through the broadening and diversification of information and rationalities contributing to it. As knowledge is dispersed across a multiplicity of actors, decisions informed by situated knowledge and experience tend to be qualitatively superior in terms of environmental performance and protection (Irwin 1995). Whether this also implies that diverging views and interests should be reflected in the substantive outcome of the decision is more difficult to assume. Thus, there is a difference between reaching better decisions and achieving a particular outcome. The latter is generally left to the discretion of the decision-maker within the limits established by law.

An instrumental rationale complements procedural and substantive rationales for public participation based on the idea that participation is a way to facilitate implementation of policy decisions (Lee 2014, 178). Public participation in this sense provides "social intelligence and strategic information for the shaping, presentation and implementation of pre-committed policy choices, [and] as guidance on how best to forestall or mitigate negative social reactions" (Stirling 2005, 221). However, this instrumental rationale of participation tends to prioritise facts over values (Black 1998). It might restrict either the group of participants, or the range of legitimate arguments to those coming from 'experts' (Fischer 2000; Wynne 2006). Although important, this approach often squeezes out socio-cultural values from the realm of what counts as 'good reason' for a decision (Jasanoff 2007; Lee 2010).

Participation in both planning and EIA are mainly rooted in a procedural rationale, with some variations as to the related functions. Participation in land-use planning procedures primarily serves to legitimise local decision-making and balance a broad variety of local land-use related concerns drawing on the ideas of communicative or collaborative planning (Healey 1997). Participation in EIA procedures also aims to improve or broaden the level of knowledge on potential environmental impacts in decision-making, possibly with a tendency to focus on

more technocratic and science-based arguments (Holder 2004), and often at the expenses of ‘multiple knowledges’ (Pieraccini 2015).

In environmental decision-making, public participation is closely connected to the notion of access to justice, which implies a right to seek review of a decision under specific conditions, e.g. as reflected in the Aarhus Convention. The nexus between access to justice and participation is both conceptual and legal in nature. Access to justice is a fundamental human right and provides a form of engagement with governance processes (Francioni 2007). In this sense, access to justice reinforces and builds on public participation to serve calls for environmental justice more broadly (Schlosberg 2004).

The conceptual nexus between participation and access to justice is particularly interesting in the context of planning decisions. Traditionally, planning law and regulation has been concerned with the tensions between property rights protection and public participation in decision-making (Fainstein 2011; Lane 2005). These two themes are particularly evident when looking specifically at access to justice through the mechanisms of planning appeals and their rationales. In jurisdictions where the participatory rationale in planning is strong, such as in Denmark, appeal rights are granted to a wider public, although restricted to matters of legality. Other jurisdictions may provide a review also of the discretionary elements of the decision, as is the case in Ireland (Ellis 2002). In jurisdictions drawing on property rights-based rationales, such as England, this rationale in planning appeals is exemplified by limiting the right of appeal to landowners or developers. The English property rights oriented approach to appeals has spurred institutional and scholarly debate on the need and meaning of TPRA in planning (House of Commons 2002; House of Commons 2000; Clinch 2006). In the case of decisions having a substantive impact on local community, the rationale at the root of access to appeal for third parties is particularly important. Ellis notes how TPRA tend to ‘touch raw nerves in confronting [the] difficult balance planning must achieve between public and private interests, between rights to property and procedural rights and between efficiency and effectiveness’ of decision-making (Ellis 2006). Under this conceptualisation of access to justice and appeals, we argue that the line between participation and access to justice is a fine one. Third party appeal can then be seen as a way to give ‘a second chance’ to the reasons of the public and *de facto* extend the space of participation beyond the decision-making process. In this sense, access to justice constitutes an element of participation and democratic engagement (Leitch 2015).

But from a strictly legal perspective, the link between access to justice (including in the form of TPRA) and participatory rights in environmental decision-making is institutionalised

through enforcement logic. In this sense, access to justice is the tool to procedurally ensure the fulfilment of participatory rights, rather than an extensive element of those rights.<sup>1</sup> This enforcement rationale is primarily reflected in the Aarhus Convention, as we illustrate in the next section.

### **3. The Legal Framework for Public Participation and Rights to Appeal in Environmental Decision-making in the European Union**

The 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice on Environmental Matters (“Aarhus Convention”) constitutes the most detailed international instrument dedicated to public participation and access to justice in matters related to environmental decision-making. It clearly implements Principle 10 of the Rio Declaration on public participation on environmental decision-making (UN 1992). The European Union, as well as both Denmark and the United Kingdom, are contracting parties to the Convention, making this instrument a necessary starting point for exploring the contours of the legal right to participation and appeals in these jurisdictions. The public participation requirements of the Aarhus Convention are often linked to, and implemented through, EIA procedures establishing an important platform for public participation in environmental decision-making. In this context, we will mainly focus on the relevant provisions regarding projects, as reflected in article 6 of the Aarhus Convention and in the EU EIA Directive (Directive 2011/92/EU). The EU EIA Directive explicitly incorporates the participation and access to justice requirements of the Aarhus Convention into the EU legal framework for environmental impact assessment, thereby making these requirements directly enforceable under EU law.

#### **3.1. Public participation**

The Aarhus Convention frames participation as one of its three pillars, together with access to environmental information (article 4 and 5) and access to justice (article 9). Parties are obliged to ensure that the right of individuals and environmental non-governmental organizations (NGOs) to participate are recognised with respect to specific activities (article 6), plans, programmes and policies (article 7) and the preparation of “executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment” (article 8). According to the Aarhus Convention and the EIA Directive, the rights to participate in decision-making are granted to the “public concerned” defined as ‘the public affected or likely to be affected by, or having an interest in, the environmental decision-

making’ (article 2.5). NGOs promoting environmental protection and meeting any requirements under national law are “deemed to have an interest” (article 2.5). Article 6 of the Aarhus Convention obliges the Parties to make available relevant environmental information on projects or activities which may have a significant effect on the environment, including the mandatory activities listed in Annex I. It mandates that procedures for public participation allow “the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity” (article 6.7). The Convention also stipulates that participation must happen “early” in the process, i.e. “when all options are open and effective public participation can take place” (article 6.4). In general legal terms, participation can be understood as consultation, i.e. having a right to submit comments or attend public hearings. This implies a more active role of the public than the simple the right to receive information, but does not go as far as requiring a deliberative approach by empowering the public to fundamentally shape decisions. Although the value of participation to “enhance the quality and the implementation of the decisions” is recognised in the Preamble of the Convention, what is effectively granted here is a procedural environmental right to individuals and groups to participate in the decision-making process and subsequently to appeal such decisions (Preamble recital 9). The question of the weight to be given to lay public views and concerns is, perhaps unsurprisingly, not addressed. Nor is the assessment of the substantive ability to influence the outcome of the process within the Convention’s meaning of participation. Similarly, environmental assessment, and the scope for participation within it, is in essence a procedural requirement with no guarantee or even directions as regards the substantive outcome of the final decision.<sup>2</sup> But although the legal requirements are merely procedural in nature, the ‘line between substance and procedure [...] is not a clear one’ as an EIA provides key information for all actors to think about the substantive impact of the decision (Lee 2014, 165).

### **3.2 Access to justice and appeals**

Participatory rights are interconnected with the right to access to justice through review by courts or by other independent and impartial bodies established by law, e.g. administrative appeal bodies or tribunals (UNECE 1998, article 9; European Commission 2017). The Aarhus Convention – and consequently the EIA Directive - explicitly links the participatory rights to access to justice rights under a legal enforcement rationale. The Aarhus Convention Implementation Guide clarifies this linkage, by stating:



‘The rationale behind the access to justice pillar of the Convention is to provide procedures and remedies to members of the public so they can have the rights enshrined in the Convention on access to environmental information and environmental decision-making, as well as national laws relating to the environment enforced by law. Access to justice helps to create a level playing field for the public seeking to enforce these rights. It also helps to strengthen the Parties’ implementation of, and compliance with, the Convention as well as the effective application of national laws relating to the environment. The public’s ability to help enforce environmental law adds important resources to government efforts.’ (UNECE 2014, 187).

This legal approach to the nexus between participation and access to justice is important. Instead of seeing access to justice as an extension of the right to participate beyond the decision-making process (as discussed above), here it is framed as an “enabler” of the enjoyment of the right to participate *within* that process. Here access to justice mechanisms fulfils three important objectives in relation to participation: it provides procedures and remedies to enforce participatory rights; it offers fair and equal footing for the public to see these rights recognised; and it helps improve institutional compliance and accountability. This enforcement rationale is also reflected in the case law of the Court of Justice of the European Union (CJEU).<sup>3</sup>

Access to justice comes in different forms within environmental law. The Aarhus Convention defines access to justice in relation to participatory rights as access to “a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6” (article 9.2). This broad definition opens up the mechanisms of access to justice not only to judicial review systems, but also to administrative appeal mechanisms, with which we are concerned here. Two aspects are particularly important here: 1) the scope of the review procedure and 2) who has access to it.

As regards the scope of review, a legality review would normally only review the lawfulness of a decision/act, i.e. whether substantive or procedural requirements of law have been complied with by the decision/act, as opposed to the more discretionary elements of the case balancing opposing interests (UNECE 2014, 196). The terminology as regards the scope of review is not crystal clear. In some respects, a distinction is drawn between legality and merits review, where “a merits review is characterised by the power to exercise afresh the decision-making power vested in the original decision-maker” (Cane 2000). In such cases, the merits reflect the policy element of a decision, i.e. the balancing of different interests, whereas

the legality addresses the lawfulness of a decision, including both procedural and substantive legality. In other respects, merits is used more broadly to include also substantive legality issues. When it comes to appeals or review options, the underlying rationales of the different types of environmental decision-making are important. This means that appeals regarding planning decisions may play out quite differently than appeals or review of EIA decisions. While the latter is strongly influenced by EU law and the Aarhus Convention, appeals regarding planning decisions are much more dependent upon the national planning systems and their underlying rationales despite similar, and to some extent overlapping, participatory procedures.

The scope of review in different appeal or review systems is often dependent on the expertise of the court or appeal body. Administrative appeal bodies – but sometimes also administrative courts – may in some cases be conceived as quasi-judicial bodies to reflect (or duplicate) more specific expertise or interests at stake in the administrative decision-making. This will normally allow for a broader review – possibly also of the discretionary elements of case – as opposed to the often narrow or restricted review by courts in general.

As regard access to review procedures, the Aarhus Convention strongly links access to the participatory rights, granting explicit rights to the members of the public concerned. It is clear that NGOs have a privileged status. When it comes to the right of access of individuals, the CJEU has applied a very wide interpretation of who has a sufficient interest or impairment of a right at national level, drawing on both the objective of ensuring wide access as well as the principle of effectiveness of EU law.<sup>4</sup> In the next section, we explore how the rationales and linkages between participation and access to appeals play out in the regulatory decision-making for onshore wind energy infrastructure in England and Denmark.

#### **4. Public participation and appeals in decision-making for onshore wind energy developments in England and Denmark**

The development of onshore wind energy has followed different trajectories in England and Denmark (Toke 2002, Gipe 1995). Wind energy is an important component in meeting the targets of renewable energy consumption as reflected in the EU Renewable Energy Directive (Directive 2009/28/EC). The UK has set a target of 15% of its energy consumption from renewable sources by 2020 (National Renewable Energy Action Plan), while Denmark already achieved the set 2020 target of 30% renewable energy in 2015 (Energistyrelsen, 2017).<sup>5</sup> To achieve these goals, government policy in both England and Denmark has long emphasised the need and urgency for developing more wind energy capacity through siting of large scale wind energy infrastructure (DECC 2011a).

The analysis of how the legal framework shapes the space for public participation and appeals in relation to decision on major wind energy infrastructure siting in England and Denmark is interesting. The main challenges to, and factors shaping, local acceptance to wind projects appear to follow analogous discourses. Research across these two jurisdictions shows that public acceptance of these infrastructures has been challenging, resulting in local opposition. The reasons of opponents are complex and site-specific. However, they often point to the ‘social and physical saturation of onshore wind energy’ (Tomei 2017; Clausen et.al. 2019); landscape and visual impact concerns (Lee 2017; Olsen and Anker, 2014) and perceived unfairness in the distribution of costs and benefits between local and national level (Cass et al., 2010, Devine-Wright, 2005; Walker et al., 2007, 2010; Wustenhagen et al., 2007; Bristow et al., 2012; Parkhill et al., 2013). The contested recourse to community benefits is another common feature in both England and Denmark, with variations as of the choice of mechanism (Armeni 2016; Rudolph et al. 2017; Rønne 2016).

On the background to these issues, policy changes and shifting national objectives have played a key role in the way the technology has been framed in both jurisdictions, making the two planning systems to converge with respect to the consent process for onshore wind energy infrastructure (as discussed below). Yet, there are critical differences in particular as regards third party access to administrative appeal. While the Danish planning system provides for a broad access to administrative appeal by third parties, this is not possible within the English planning system, being it an exclusive right of the applicant. Despite these procedural differences, we found that the effect in terms of (limited) scope for participation by appeals is equivalent.

#### **4.1. Decision-making and participation requirements**

In Denmark, decision-making powers for onshore turbines generally rest with the local authorities (i.e. local councils) both as regards planning and EIA.<sup>6</sup> In England, following a policy shift in 2016, the decision-making power for large onshore wind projects is also with local authorities. Under the ordinary planning system, local planning authorities (LPAs) are now responsible for granting planning permission (which includes EIA requirements) for all onshore wind turbines, both small and large projects.<sup>7</sup>

In Denmark, a wind energy project will normally require the adoption of a local plan by the local council in accordance with the Planning Act.<sup>8</sup> A local plan lays down binding, detailed rules regarding onshore wind projects in a specific area (e.g. the precise location, number, height as well as the design of the turbines).<sup>9</sup> The local plan must be in accordance

with higher level plans, including in particular the more strategic municipal land use plan. A local plan for wind turbines can only be adopted if the site has been designated as a potential wind turbine site in the municipal plan.<sup>10</sup> Ideally, this planning system provides for a two tier-planning by the local council: 1) the strategic municipal plan, and 2) the detailed local plan for the project. At both levels, the local authorities shall provide for public participation in the form of a public consultation period of 4-8 weeks for submission of comments on the draft plan. There are, however, claims that the two-tier system does not work as several municipalities have been reluctant to designate potential wind turbine sites (Anker 2016; Olsen and Anker 2014).

In most cases, an EIA for the proposed project will be required prior to the adoption of the local plan, while a strategic environmental assessment (SEA) is required prior to the adoption of a municipal plan and, in principle, also prior to the adoption of a local plan. Until 2017, an EIA was mandatory for turbines above 80 m or in groups with more than 3 turbines. Following the adoption of a new Act on Environmental Assessment of Plans and Projects<sup>11</sup> in 2017, wind turbines are no longer subject to mandatory EIA, but to a case-by-case screening procedure determining whether an EIA is required or not. The new Act also separates the EIA legislation from the Planning Act. If an EIA is required, an EIA report – or an Environmental Statement (ES) - must be compiled by the applicant and an EIA permit must be issued by the competent authority, normally the local council. The EIA report will be subject to public hearing – normally alongside the local plan proposal. According to the Environmental Assessment Act, a public consultation period of minimum 8 weeks shall be provided. If a project is subject to an EIA there is, however, also an obligation to make a public call for ideas prior to the elaboration of the EIA report (pre-consultation). The local authorities are responsible for making the EIA report and the local plan available for public consultation and for gathering the comments from the public.

In England, the process for granting consent for major onshore wind project is now similar to the Danish one. Planning permission from the local authority is required for all onshore wind energy developments (except domestic turbines). The regulatory decision-making process and time-frames for the decisions are set by Order under the Town and Country Planning Act 1990 (hereinafter “TCPA”).<sup>12</sup> For applications that involve the installation of more than 2 turbines or the hub height of any turbine or height of any other structure exceeds 15 metres, which are defined as ‘the most significant onshore wind applications’, the local planning authority must assess whether the development is likely to have significant effects on the environment for the purposes of an EIA.<sup>13</sup> The 2017 Regulations govern the procedure and

consultation requirement in this case, as they transpose the amended EU EIA Directive.<sup>14</sup> Like in the Danish EIA framework, where an assessment is required, the applicant must prepare and submit an Environmental Statement (ES) together with the planning permission application. The ES must include at least the information reasonably required to assess the likely significant environmental effects of the development.<sup>15</sup> These regulations apply to developments which are given planning permission under Part III of the TCPA, merging the planning and EIA regimes for onshore wind developments into one single decision-making process.

Within the English planning system, pre-application consultation with local community is compulsory for ‘the more significant onshore wind applications’.<sup>16</sup> This consultation requires the applicant to publicise the application in order to bring it to the attention of the persons living in the vicinity of the land, as well as consult with each person specified in a development order.<sup>17</sup> The applicant must include details on how they complied with the pre-application consultation requirement when applying for planning permission, the responses received and how they have been taken into account. While participants have no veto in the planning process, the 2016 policy shift was intended to give local community more control and influence over siting decisions. Within this context, the LPA is required to only grant planning permission if a) ‘the development site is in an area identified as suitable for wind energy development in a local or neighbourhood plan; and b) following consultation, it can be demonstrated that the planning impacts identified by affected local communities have been fully addressed and therefore the proposal has their backing’ (DCLG 2015). Whether the backing of the local communities is present is ‘a planning judgement for the local planning authority’.<sup>18</sup> After the application is submitted, the local planning authority will undertake a formal consultation with the neighbouring residents, community groups, statutory consultees (such as Natural England, the Environment Agency) and any non-statutory consultees.<sup>19</sup> Additional consultation can be necessary following changes to the application submitted by the applicant.

It is apparent that the general legal framework for planning and participation in siting decisions for onshore wind energy project in England and Denmark is quite similar, but with some variations. A noteworthy difference regarding participation is the relationship between planning decisions and EIA. In England, the developer has responsibility for an initial consultation of the public concerned prior to submission of planning application followed by a public hearing by the LPA. In Denmark, the legal framework places the responsibility for public participation with the local authorities and in practice public consultation regarding EIA and planning will be combined.

## 4.2. Planning Appeal Systems

Despite relatively similar decision-making procedures, administrative or planning appeals and the opportunities for TPRA against planning decisions are at odds in Denmark and England, at least from the outset. The Danish planning system recognises a broad TPRA to the administrative Planning Appeals Board, whereas the English system does not allow TPRA against planning decisions. This difference is interesting in the light of the arguments about the conceptual linkages between public participation and the right of the lay public to appeal a planning decision, discussed above.

Denmark has a long tradition of administrative appeals within environmental and planning law relying on specialised administrative appeals boards.<sup>20</sup> Traditionally, the administrative appeals boards perform a full review, including the merit – or discretionary policy element - of the decision. However, the review of planning decisions is limited to issues of legality, including also questions on substantive legality (i.e. whether the plan is in accordance with higher level plans or general principles of administrative law). When it comes to EIA decisions, there is a full review of an EIA permit by the Environment and Food Appeals Board. In practice, however, the appeal board will be unlikely to review any discretionary elements of an EIA permit (e.g. how local concerns have been taken into account), unless this is needed to meet legal requirements.

While the scope of review of planning decisions is somewhat limited in Denmark, administrative appeals are open to those having a legal interest, including environmental NGOs, as laid down in the Planning Act (Sec. 59). The legal interest is determined by the nature of the case and may consequently vary from one type of case to another. In planning and environmental assessment, matters of legal interest is generally very broad considering the wide public participation procedures. There is no requirement of having to register or submitting comments in the consultation process in order to have access to appeals. Landowners or developers do not have any privileged status as regards access to administrative appeals in planning or EIA matters, as there is no a priori “right to development” in Denmark. Administrative appeal in wind energy cases is thus quite broad allowing citizens and local NGOs to appeal, unless their connection to the local area is too limited or distant. By far, most administrative appeals in wind energy cases are brought by neighbours and local citizens. In the period from 2011 to 2015, 27 appeal decisions regarding wind energy projects were reported.<sup>21</sup> All cases were appealed by local citizens and a few also by NGOs. However, only three appeals were successful. In these three cases, the plans were declared invalid due to inappropriate assessment of potential effects on protected species (e.g. bats and birds), as well

as failure to appropriately assess the cumulative landscape effects in combination with existing turbines.<sup>22</sup> Such issues of mainly procedural legality could, however, be corrected subsequently, and at least one of the three projects has later been approved.<sup>23</sup>

The approach to appeal against planning decisions is radically different in England. Within the English planning system, ordinary planning decisions can be challenged by statutory review on ground of legality (section 288 TCPA) or by a planning appeal on the merit to the Secretary of State (Section 78 TCPA). Under the TCPA, only the applicant who has been refused planning permission or disagrees with a condition imposed on the planning permission has the right to appeal to the Secretary of State for Communities and Local Government.<sup>24</sup> Any other party can only challenge the decision by statutory review (i.e. legality review under section 288 TCPA). No right to administrative appeal is therefore granted to the lay public or any other third party. Once the appeal has been validated, all interested parties (i.e. those who are interested/affected by in the outcome of an appeal, but who have no legal interest, not being the applicant or the local authority) can, however, take part, making comments and representations. Their representations are material considerations and are taken into account by the appeal body. The Planning Inspectorate will take a decision within 19 weeks. The appeal decision has a quasi-judicial function as it constitutes a judgement on the specific course of action and circumstances based on policy context and its desirability, reasonableness and equitability. The planning appeal and related cost decisions can be challenged on the ground of legal error before the High Court of England and Wales (Administrative Court) within 6 weeks from the appeal decision.

## **5. Discussion**

Thus far we have illustrated how the international, EU and national (i.e. England and Denmark) legal frameworks for environmental decision-making shape the space for participation and its linkages with administrative or planning appeals, focusing on onshore wind energy infrastructure development. Here we reflect on their implications in terms of a) the scope for public participation and b) the participatory potential of administrative appeals in planning for wind energy developments in England and Denmark. This discussion builds upon the explanation of the conceptual linkages between, and multiple rationales for, participation and right to appeal in section 2.

Firstly, the legal frameworks in England and Denmark in general reflect a procedural rationale for participation framing it as a condition for the democratic legitimacy of the decision-making process. In the case of wind energy projects, participation is also often

justified as a way to reduce opposition and catalyse acceptance of the developments, implementing an instrumental rationale for participation (Rønne 2016, Cass and Walker 2009, Haggett and Vigar 2004). In some situations, this also includes participation in the pre-application phase. Participation in wind energy decision-making in England and Denmark is not limited to specific groups or members of the public and is open in the sense that all arguments can be put forward. Furthermore, in England, these procedural and instrumental rationales have emerged in particular with respect to participation in decision on large scale wind farms until recently focused on the Nationally Significant Infrastructure Projects (NSIPs) regime (Natarajan et.al. 2018; Armeni 2016; Rydin et.al. 2015; Lee et.al. 2013; Haggett 2011). This has been related to the extent to which national policy objectives for more large scale wind energy infrastructure restrain the ability for ‘other arguments’ to count and have weight in the decision-making (Lee and others, 2013). This implies that the meaning given to participation in this context is the one of a primarily procedural and instrumental mechanism to ensure legitimacy of the process and the implementation of its outcomes. This approach has been criticised as a cynical exercise to have people on board for the implementation of a decision, which has been already predetermined based on a policy-based presumption in favour of development (Armeni 2016; Haggett 2011). This results in a lack of trust and frustration from the part of the public in the ability to influence the quality and substance of the decision (Todt 2003, Cowell et.al. 2016). A fundamental change occurred in relation to onshore wind energy projects, which have now gone back to the local authority through ordinary planning. This has been explained as a policy shift to empower local communities. However, this is matched with a general disengagement from the part of the UK government towards onshore wind energy infrastructure, using perhaps participatory reasons as an excuse to justify local rejection (House of Commons 2011).

In Denmark, decision-making regarding onshore wind energy projects has rested with the municipalities for several years. Local politicians have been faced with increasing local opposition, e.g. as part of public consultations in planning and EIA procedures. The participation procedures have been criticised for being too narrow, too late and for not allowing more value-based arguments (Concito 2018). Thus, the same type of criticism raised against the English decision-making procedures for NSIPs has been voiced in Denmark. Nevertheless, there is some evidence in Denmark that opponents have actually succeeded in influencing local politicians who have backed off from designating potential wind turbine areas in the municipal plans and in some cases also from wind energy projects at a late stage in the planning process.<sup>25</sup>



Yet, this has not stopped the criticism regarding the lack of real (or substantive) participation in the decision-making processes for wind energy projects (Concito 2018).

Whether it is the legal framework that narrows down the space for participation in decision-making or whether it is more the practice of participation that leads to perceptions of a narrow participatory scope is contested. In particular EIA procedures may tend to focus more on technical and scientific issues, although broader issues such as landscape aesthetics and socio-economics are also taken into account. More intangible local interests such as place attachment and quality of life are generally not considered legitimate arguments in an EIA procedure. Furthermore, some interests have a stronger legal protection than others, e.g. due to strict protection regimes such as the species protection under the EU Habitats Directive (Directive 92/43/EU). Planning procedures are in general more open in the search for a balance of different interests, including also more intangible concerns. Yet, when public participation is combined with EIA procedures, this may narrow down the scope for such value-based arguments as opposed to more expert-based or scientific arguments (Cashmore et.al. 2018). This appears to be a general criticism in both England (Holder 2004) and Denmark (Clausen et.al. 2019).

Secondly, the linkages between participation and appeals in the Aarhus Convention clearly reflect an enforcement rationale for access to justice, viewing appeals as the tool to enforce the participatory rights granted under the Convention. In a planning context, some have gone further stressing the potential of TPRA as a mechanism to not only legally enforce, but also virtually extend democratic participation beyond the decision-making stage (Ellis 2006). But, when it comes to appeals – and in particular appeal rights of third parties (TPRA) –, there are significant differences in England and Denmark. The Danish legal framework provides for a broad access for neighbours and other third parties to appeal planning and EIA decisions – since 2017 in two different tracks. Yet, the limitation of the scope of review to matters of legality means that TPRA does not in practice extend the scope for substantive participation beyond the decision-making. Nor is it intended to do so. When it comes to EIA decisions, this is slightly different as a full review is in principle possible. This should, however, be considered in view of the mainly procedural nature of EIA requirements. This means that a full review is likely only to be based on procedural and substantive legality, including substantive environmental protection requirements, e.g. as regards noise levels. There is a risk that the limitation to legality review is poorly understood by third parties in the sense that they rely on administrative appeals as a means to “continue the fight” against wind turbines. As mentioned in section 4.2 recorded cases show that third parties, such as neighbours, are only successful in

their appeals against wind energy projects in very few cases. And when they are successful it may be a matter of time before the legality issues have been corrected and the project is allowed to proceed, unless it is a matter of strict substantive protection requirements of e.g. biodiversity.

Conversely, the English appeal system is only open to the developer and in principle provides for a review also on the merits. The public cannot independently trigger the appeal, but can participate into it. It could be argued that, despite the formal exclusion for the lay public to access the appeal, the English system may in these limited circumstances have the effect of extending the scope for participation beyond the local decision-making level. In particular, there are numerous examples where local citizens' group decided to appear as interested parties against a developer's appeal in support of the local authority's decision to refuse to grant planning permission (Ogilvie and Roots 2015). But this avenue for participation is still dependent to the developer's appeal initiative, making the scope of this argued extended participation conceptually restricted. Furthermore, it has been argued that the "juridification" of engagement in appeal systems narrows down the space for personal or lay concerns (Aitken et al 2008, Larsson & Emmelin 2016). From a participatory perspective, it is difficult to accept a blank approach to administrative appeal systems - like the English one - that reserves the right of appeal to the developer or landowner, but rejects TPRA. The property rights justification for such a limited access to appeal fuels views that the appeal process is biased and fails to accommodate the participatory nature of planning (Ellis 2006). On this point, Willey argues that "[i]f planning appeals in England are to move beyond their property rights genesis and take their place in the context of modern governance, it seems third party appeals must be recognised at some level." (Willey 2006, 386). Ellis points out that the "TPRA is, ultimately, [...] a test of how far ideas of collaborative, environmental governance have been absorbed into our thinking of land-use regulation" (Ellis 2006, 340). An important point is, however, that TPRA may transfer decision-making from the local level to a democratically unaccountable appeal body unless the scope of review is restricted to legality.

Based on a procedural rationale for participation in planning and EIA, it can be argued that the associated appeal systems are likely to be based on a similar procedural – or perhaps even instrumental – rationale of enforcing either participatory or property rights. Given their limitations, it is hard to see how they could follow a substantive rationale extending participation beyond the decision-making level. A good example of its inherent procedural limitations is represented by the Danish system. Here, the underlying rationale of appeal is ensuring effective enforcement of the participatory rights, but only as regards the legality. Thus, not only the right of access, but also the scope of review is important if administrative

appeals should be seen as an option to extend public participation beyond the local decision-making level. For infrastructure developments like wind energy projects, the main focus is to provide access to a review body in accordance with the requirements of the Aarhus Convention – be it an administrative appeal body, an administrative court or a general court. In principle, access to review should ensure an equal footing between landowners and citizens. At the same time, it must be made clear whether there are any limitations as regards the scope of review, e.g. from the point of view of safeguarding local democracy. We might then conclude that, although conceptually interesting, the appeal system would need careful consideration both as regards the scope of review and who has access in order to respond to the critique raised as regards a narrow scope for public participation in wind energy decision-making.

The consideration of the substantive contribution of the lay public to the quality of the decision should remain a key concern of the decision-making process. This is also due to the nature of the legal and regulatory system of planning that tends to only impose procedural requirements with respect to participation, while leaving more discretion to the decision-makers in exercising planning judgement, compared with the limitations imposed on the right to appeal. Even though the Aarhus Convention provides for a wide access to review decisions this is not necessarily in the form of administrative appeal rights, but more often in the form of judicial review by courts. Furthermore, the enforcement rationale underpinning the access to justice requirements of the Aarhus Convention only supports a legality review and not a review of the policy discretion on whether to approve wind projects or not.

## **6. Conclusions**

The aim of this article was twofold. On the one hand, it intended to shed some light on how the legal framework shapes the space of participation and the ability of the public to influence decisions on wind energy projects in two EU member states with large wind energy interest and potential. On the other hand, it also sought to stimulate a reflection on the relationship between individuals' rights to participate in the decision-making process and their (potential) right to appeal such decisions as reflected in the notion on third party rights of administrative appeals.

Public participation is a complex aspect of decision-making bringing to light its overlapping rationales as well as the tensions between evidence based scientific facts and lay public values. These types of complexities and tensions are also clear in the context of our case studies on public participation and appeals in decision-making on onshore wind farms. These challenges, coupled with a difficult balance between national and local policy objectives and

interests in planning, make the scope for substantive participation problematic. Ultimately, while participation is presented in law as an essential condition for the procedural and substantive legitimacy of decision-making, it means different things to different people, making its consequences unpredictable and ambiguous. Participation represents a possibility to improve the quality of a project and its acceptability by the local community, bringing experts and the lay public together to shape the low-carbon energy transition. Despite its potential, the ability for the public to substantially influence decisions is often limited in law, leaving participation as a mere procedural matter.

Whether options for appeals can extend the scope of participation is however contested. Although an enforcement rationale institutionalises the nexus between participation and appeals, access to justice remains highly challenging when it comes to judicial review by the courts often being confined to a narrow legality review and not easily accessible. Where they exist, TPRA may offer an easy, cheap and relatively expeditious procedure for citizens as opposed to the often cumbersome court procedures. But, access and/or the scope of review within this appeal system is often limited. This suggests that the limitations and challenges associated with lay public participation in environmental decision-making and planning cannot be easily resolved through mechanisms, such as TPRA in planning, once the decision has been made.

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## Endnotes:

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<sup>1</sup> Cft with a similar debate on whether tort law provides assertion of rights or participation in decision-making. See Steele 1994, 239-242.

<sup>2</sup> See C-418/04 *Ireland*, [2007] I-10947, para. 231 (comparing the EIA and SEA Directives with the Habitats Directive) and C-420/11 *Leth*, [2013] 166, para. 41.

<sup>3</sup> E.g. C-72/12 *Altrip* [2013] 712 where the CJEU stated that the Member States “may not make it in practice impossible or excessively difficult to exercise the rights” conferred by the EIA Directive with particular reference to the rights to participate in decision-making (para. 45)

<sup>4</sup> E.g. C-570/13 *Gruber* [2015] 231 where the Court ruled that precluding neighbours from bringing an action against an administrative decision not to undertake an EIA was not in accordance with Art. 11 of the EIA Directive (para. 51). The CJEU, however, (somewhat contradictorily) noted that any national criteria concerning “sufficient interest” or “impairment of a right” should be fulfilled. See also C-72/12 *Altrip* where it should be taken into account whether the public concerned had been deprived “of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making” (para. 57).

<sup>5</sup> In 2017, the wind energy share of electricity production was 43.24 % , while the national 2020 target is a 50 % wind energy share of electricity production.

<sup>6</sup> For onshore wind turbines above 150 meters, the decision-making powers rest with the Ministry for Environment and Food. Most wind turbines in Denmark have so far been below 150 m and decided by the local authorities. Projects may also be adopted by a separate act of Parliament, e.g. Act no. 647/2010 on a test site for large wind turbines at Østerild.

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<sup>7</sup> In accordance with the policies set out in the *National Planning Policy Framework* and following the procedure set out in the *Town and Country Planning Act 1990* and the *Town and Country Planning (Development Management Procedure) (England) Order 2010* (SI 2010/2184). Prior to this amendment, large scale onshore wind energy infrastructure above 50 MW of electricity generating capacity were considered Nationally Significant Infrastructure Projects (NSIPs) under the Planning Act 2008 and required development consent order (DCO) from the Secretary of State, following an examination and recommendations by the Planning Inspectorate.

<sup>8</sup> Consolidated Act no. 287/2018 on planning (lovbekendtgørelse 287/2018 af lov om planlægning).

<sup>9</sup> Statutory Order no. 1590/2014 on planning for wind turbines (bekendtgørelse nr. 1590/2014 om planlægning for og landzonetilladelse til opstilling af vindmøller).

<sup>10</sup> It is, however, possible to adopt a municipal plan supplement that designates the site at the same time as the local plan is adopted.

<sup>11</sup> Act no. 426/2016 on environmental assessment of plans and programmes and projects (lov om miljøvurdering af planer og programmer og af konkrete projekter).

<sup>12</sup> Town and Country Planning (General Permitted Development) (England) Order 2015 (No 2015/ 596).

<sup>13</sup> The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (Schedule 2).

<sup>14</sup> Town and Country Planning (Environmental Impact Assessment) Regulations 2017.

<sup>15</sup> Id. Regulation 18 (3) and 18(4).

<sup>16</sup> Town and Country Planning (Development Management Procedure and Section 62A Applications (England) (Amendment) Order 2013 (Si 2932)

<sup>17</sup> Town and Country Planning Act 1990, Section 61 W.

<sup>18</sup> Ibid.

<sup>19</sup> These are individuals or groups with a special interest whose consultation is not required by law, but is justified by reasons of planning policy.

<sup>20</sup> This dates back to the establishment of a Nature Conservation Appeals Board in 1917 and an Environmental Appeals Board in 1974. Within planning law a new Nature Appeals Board in 1992 replaced the former Planning Agency (Planstyrelsen) as the administrative appeals authority within the Planning Act. Since February 2017 a separate Planning Appeals Board has been established alongside a new Environment and Food Appeals Board.

<sup>21</sup> Based on the recorded cases at the website of the Nature and Environment Appeals Board, <http://www.nmknafgoerelser.dk/>.

<sup>22</sup> Natur- og Miljøklagenævnet (Ulvemose-Bækhede), 14 December 2014 (j.nr. NMK-33-02171, NMK-34-00318, NMK-34-00365, NMK-41-00264), Natur- og Miljøklagenævnet (Skaføggaard), 2 December 2013 (j.nr. NMK-33-01230, NMK-34-00182, NMK-34-00216, NMK-41-00200), Natur- og Miljøklagenævnet (Sindrup Vejle), 17 June 2013 (j.nr. NMK33-01158 NMK-34-00168).

<sup>23</sup> Natur- og Miljøklagenævnet (Ulvemose-Bækhede), 27. May 2016 (j.nr. NMK-33-03235, NMK-34-00522, NMK-41-00348).

<sup>24</sup> However the majority of the planning appeals are decided by the Planning Inspector, to which jurisdiction has been transferred by subsequent legislation, except for large or a contentious projects for which appeal jurisdiction can be recovered by the Secretary of State in specific cases at any stage of the appeal ('recovered appeals'). (See Section 79 of, and paragraph 3 to Schedule 6 to, the Town and Country Planning Act 1990).

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<sup>25</sup> In 2015 it was reported that since 2009, 23 out of 158 local plans for wind energy projects were not adopted, <https://energiwatch.dk/Energinyt/Renewables/article7969114.ece>. In England, only two NSIPs out of 12 have been refused consent as of June 2018.